

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

The Avenue Care and Rehabilitation Center and SEIU District 1199, WV/KY/OH, the Healthcare and Social Service Workers Union. Cases 08–CA–105234 and 08–RC–088734

December 16, 2014

DECISION, CERTIFICATION OF
REPRESENTATIVE, AND NOTICE TO
SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and a first amended charge filed by SEIU District 1199 WV/KY/OH, The Health Care and Social Service Union (the Union) on May 16, and June 5, 2013, respectively, the Acting General Counsel issued the complaint on June 7, 2013, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to bargain following the Union’s certification in Case 08–RC–088734. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On July 3, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On July 9, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in this proceeding to a three-member panel.

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objection to conduct that allegedly affected the results of the election in Case 08–RC–088734.¹ In a typical unfair

labor practice proceeding, a respondent is precluded from raising representation issues that were or could have been litigated in the prior representation proceeding. However, at the time of the Board’s Decision and Certification of Representative in Case 08–RC–088734, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, supra, holding that the challenged appointments to the Board were not valid. Under these circumstances, we will not give the prior Decision and Certification of Representative preclusive effect, and we will consider anew the matters raised in the representation proceeding.

The election in Case 08–RC–088734 was held on October 12, 2012, pursuant to a Stipulated Election Agreement. The tally of ballots showed 33 for and 16 against the Union, with 1 challenged ballot. On October 19, 2012, the Respondent timely filed an Objection to Conduct Affecting the Results of the Election. The Respondent’s single objection to the election was that the Board Agent who presided over the election wore a purple vest on the day of the election. The Respondent argues that the color purple is the “official” color of the

The Respondent offers no justification for its failure to make this argument in a timely fashion in the representation proceeding. Indeed, the Respondent not only failed to raise a timely challenge to the authority of the Regional Director, it entered into a Stipulated Election Agreement in which it waived the right to a hearing and expressly agreed to the conduct of a secret-ballot election. Therefore, we reject the Respondent’s arguments as untimely, and we find that the Respondent is estopped from attacking the propriety of an election to which it has expressly agreed. See *ManorCare of Kingston, PA, LLC*, 361 NLRB No. 17, slip op. at 1 fn. 1 (2014).

Moreover, even if the Respondent’s challenge to the Regional Director’s authority were not barred as untimely, we would reject it on the merits. The delegation to Regional Directors of the authority to enter into Stipulated Election Agreements and conduct elections pursuant thereto is long-standing. See, e.g., *Douglas Aircraft Co.*, 56 NLRB 281 (1944). Congress expressly indicated its approval of this practice in Sec. 9(c)(4) of the Act. More generally, in 1961, the Board delegated decisional authority in representation cases to Regional Directors pursuant to the 1959 amendment of Sec. 3(b) of the National Labor Relations Act expressly authorizing such a delegation. Pub. L. 86–257, 86th Cong., 1st Sess., § 701(b), 73 Stat. 519, 542; 26 Fed. Reg. 3911 (1961); see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971) (by Sec. 3(b) Congress allowed the Board to make a delegation of its authority over representation elections to the regional director). This delegation occurred when the Board had a quorum and has never been revoked. Finally, Sec. 102.178 of the Board’s Rules and Regulations provides that “during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law.” See also Sec. 102.182 (representation cases should be processed to certification “[t]o the extent practicable.”) *Durham School Services, LP*, 361 NLRB No. 66, slip op. at 1–2 (2014).

Member Miscimarra agrees with the Board’s rejection of the Respondent’s *Noel Canning* arguments on the merits, as described above, and he does not reach or rely on the foregoing waiver discussion.

¹ In addition, in response to the notice to show cause, the Respondent argues for the first time that the certification is not valid because at all times during the processing of Case 08–RC–088734, the Board lacked a quorum under *NLRB v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), aff’d. in relevant part 134 S.Ct. 2550 (2014); *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013); and *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), cert. denied 134 S.Ct. 2902 (2014). The Respondent argues that in the absence of a quorum the Board “lacked the statutory authority necessary to *inter alia* delegate to its Regional Directors, determine appropriate bargaining units, direct and/or conduct an election and certify the result of an election.”

Union, and that by wearing a purple vest on the day of the election, the Board Agent destroyed the Agency's appearance of neutrality.

On November 14, 2012, following an administrative investigation, the Regional Director issued a Report on Objection recommending that the Respondent's objection be overruled and that a Certification of Representative be issued. The Regional Director found that the Respondent's objection did not raise substantial and material issues of fact or law, and that a hearing on the objection was not warranted. The Regional Director noted that the Respondent's objection was based on the color of the Board Agent's vest alone, and that the Respondent did not claim that the vest displayed the Union's logo or other markings. The Regional Director also noted that there was no suggestion that the Board Agent engaged in any behavior or made any comments that would call into question the Agency's neutrality.

On November 28, 2012, the Respondent timely filed Exceptions to the Regional Director's Report on Objection. The Respondent argues that the Regional Director erred by miscomprehending and/or misapplying Board doctrine, and by making findings of fact in a conclusory manner without analysis.

The Board has reviewed the record in Case 08-RC-088734 in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for SEIU District 1199 WV/KY/OH, The Health Care and Social Service Union, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time State Tested Nursing Assistants, Dietary Aides, Dietary Cooks, Housekeeping employees, Laundry employees, Restorative Aides and Activities Aides employed by the Employer at its

facility located at 4120 Interchange Corporate Center Road, Warrensville Heights, Ohio, but excluding all LPN nurses, RN nurses, PRN casual employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before December 29, 2014, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before January 12, 2015.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before February 2, 2015 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C. December 16, 2014

Mark Gaston Pearce,	Chairman
---------------------	----------

Philip A. Miscimarra,	Member
-----------------------	--------

Kent Y. Hirozawa,	Member
-------------------	--------

(SEAL) NATIONAL LABOR RELATIONS BOARD